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IN THE

Supreme Court of the United States

October Term, 1969
No. 945

CLAUDE S. GOSSETT, KATHERINE MAY GOSSETT, CHARLES D. WILLIAMS and BONNIE WILLIAMS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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CLAUDE S. GOSSETT, etc, and CHARLES O. WILLIAMS, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Claude S. Gossett, Katherine May Gossett, Charles D. Williams and Bonnie Williams, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1969.

Opinions Reported.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Central District of California also not yet reported, appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 11, 1969. No petition for rehearing was filed and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Is it necessary in an action for ejectment arising in California for the defendant to establish his own title or may he rely on the weakness of the plaintiffs' title?

2. Did petitioners fail to meet the requirements of the 1963 amendment to Rule 56(e), F.R. Civ. P. (See Appendix) by failing to present the defense that they had acquired title from California by operation of law?

3. Did the Circuit Court err in finding that the United States had *prima facie* title in the subject river bed land based upon self-serving Executive Orders withdrawing the land from public entry, issued in 1929 and 1931, in view of California's historic acquisition of the river bed in 1850 under the "Equal Footing Doctrine"[1] upon her entry into the Union?

4. Did the Circuit Court misconstrue California law concerning prescriptive rights in state public lands not reserved for or devoted to some specific public use?

5. Did the Circuit Court err in stating "California owns to the low water mark?"

6. Did the Circuit Court err in finding that there was no genuine issue of material fact disclosed by the record below?

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[1] *Shiveley v. Bowlby*, 152 U.S. 1.

Statement of the Case.

This is an action instituted by the United States framed in ejectment to remove the petitioners, Gossett and Williams, from subject lands and for damages for past use and occupancy of the subject land by the petitioners. The jurisdiction of the District Court was invoked under 28 U.S.C. §1345.

The lands involved are located near Blythe, California on the California side of the present flow channel of the Colorado River. Petitioners, Gossett, purchased their land for $32,000.00 in 1957 and have continuously occupied and greatly improved the land since that time. The petitioners, Williams, purchased their land for $16,000.00 in 1952 and have continuously occupied and greatly improved the land since that date. Both parties received quitclaim deeds from parties occupying the land at the time of the purchases. None of the petitioners or their predecessors in interest have patents or other written grants from the United States or from the State of California.

The subject lands lie entirely within the bed of the Colorado River, a navigable nontidal stream, as it flowed prior to the closing of the flood gates of Hoover Dam in 1933. Since the closing of Hoover Dam, the Colorado River in the area of subject lands has been little more than a canal, controlled by the United States and shifted by the United States to whatever position it chooses. The land of petitioners, Williams, borders the present flow channel and the land of petitioners, Gossett, is a short distance away from this channel.

All of the parties agreed that "on admission to the Union in 1850 title to the land either remained in the

United States or passed to California if located in the bed of the Colorado River." See page 5 of the Appendix hereto. Subject property was in the bed of the Colorado River when California was admitted and remained so at least until closing of Hoover Dam.

The land in question now lies outside of the flow channel of the river as a result of the regulation of the river by Hoover Dam.

The record shows no evidence that subject lands were ever reserved for or devoted to any specific public use.

Executive orders were issued in 1929 and in 1931 purporting to withdraw a large tract, including subject land, from public entry.

Petitioners have asserted their present ownership of subject lands both in affidavits and in interrogatories prior to the entry of Summary Judgment by the District Court.

Following the District Court's Order Pursuant to Pretrial, the State of California was made a defendant. California filed an answer disclaiming title in or right to possession of the subject property. Subsequently, the United States moved for a judgment on the pleadings as to possession, or in the alternative, a summary judgment as to possession only. The Court of Appeals affirmed.

REASON FOR GRANTING THE WRIT.

I.

The Decision Below Conflicts With Decisions of the Supreme Court of the United States and the Supreme Court of California on the Issue of Whether a Plaintiff in Ejectment Must Stand on the Strength of His Own Title Rather Than Rely on the Weakness or Want of Title in the Defendants.

The Ninth Circuit relied on *Greenleaf v. Birth,* 6 Pet. 302 at 312 (1832) for a ruling that it was incumbent upon the defendant in an ejectment case to make known the source of his title. See pages 5 and 6 of Appendix hereto. In so holding, the Court conceded that this was "an exception to the rule." See page 5 of Appendix hereto. In a long line of cases decided since *Greenleaf v. Birth,* the Supreme Court of the United States has consistently taken the view that the plaintiff in an action for ejectment must rely on its own title, not upon the weakness or absence of title in the defendant. *Field v. Seabury,* 19 How. 323; *Morehouse v. Phelps,* 21 How. 294; *Dunbar v. Green,* 198 U.S. 166; *McGuire v. Blount,* 199 U.S. 142; *Reynolds, Morrison v. Iron Silver Mining Co.,* 116 U.S. 687; *Osborn v. Froyseth,* 216 U.S. 471. The Ninth Circuit's ruling is directly contrary to the law of California as stated by the Supreme Court of that state in *City & County of San Francisco v. Brown,* 153 Cal. 644 and more recently by the Court of Appeals in *Central Savings Bank of Oakland v. Lake,* 62 Cal. App. 588.

II.

In Finding That California Took Only to the Low Water Mark, the Circuit Court Ignored the Fact That California Had Owned to the Ordinary High Water Mark for Twenty-Two (22) Years Before the Passage of California Civil Code Section 830 and Also Ignored the First Fourteen (14) Words of the Statute.[2]

The basis for the holding below that California took only to the low water mark in the Colorado River bed is Section 830, enacted 1872. When California entered the Union in 1850, she took the bed of the Colorado River to the western ordinary high water mark by virtue of the "equal footing doctrine" (*supra*). This was the *grant* under which California became the owner, and under it, California became owner to the high water mark. The United States then and there surrendered title up to the high water mark. The language of the statute clearly indicates that the legislature was intending prospectively to apply the low water mark rule only where some other intent was not clear at the time of transfer of title. The cases cited by the Circuit Court refer to transfers occurring after the passage of the statute. The acquisition of title by California had been completed for twenty-two (22) years when Section 830 was enacted and the intent in 1850 was clear. California took to the high water mark and Section 830 did not change the property line between the State and the United States.

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[2]*Except where the grant under which the land is held indicates a different intent,* the owner of the land . . . when it borders upon a navigable lake or stream, where there is no tide . . . takes to the edge of the lake or stream, at low water mark . . ." (Emphasis added).

III.

The Circuit Court Was Fatally Inconsistent in Accepting California's Disclaimer of Any Interest in Subject Land (See Page 7 of Appendix Hereto) and Then Holding That Petitioners Were Barred From Asserting Prescriptive Rights on the Theory That the Land Is Dedicated or Held for Public Use. See Page 7 of Appendix Hereto.

The Circuit Court in rejecting the defendants' assertion (in argument before the Circuit Court) that petitioners had acquired title from California by adverse possession relied on the statement that ". . . the California Courts have uniformly held that the land owned by the State, or its subdivisions, which is dedicated or held for public use is not subject to loss by adverse possession." See page 7 of the Appendix hereto. All of the cases cited by the Circuit Court for this proposition refer to specific dedication for a particular public purpose. *City of San Diego v. Cuyamaca Water Co.,* 209 Cal. 105, refers to water rights and a city-owned water course. *City of Oakland v. Burns,* 46 Cal. 2d 401, deals with an airport. *Sixth District Agricultural Association v. Wright,* 154 Cal. 119, has reference to lands being used for agricultural exhibits and a county fair. *City of Los Angeles v. Anderson,* 206 Cal. 662, discusses reclaimed tideland. In each of these cases the public land was the subject of a special dedication to a specific public use. There was no evidence before the Ninth Circuit that any of subject land had ever been devoted to any particular public use. The cases cited sustain rather than deny the petitioners' prescriptive rights against California acquired through continuous occupancy for the statutory period. *Califor-*

nia Code of Civil Procedure, Section 315.[3] If California really does not own the land, there is no dedication or holding for public use. If California does own the land, it has never dedicated nor held the land for the type of specific public use which prevents loss by prescription. Obviously if California owns the land, no matter how it uses it, the plaintiff, United States, cannot maintain an action for ejectment.

IV.

A Genuine Issue of Material Fact Exists as to Whether Subject Land Was in the River Bed of the Colorado River in 1850 and as to Whether Subject Land Remained a Part of the River Bed Throughout the Natural Changes of the River Over the Years.

All parties agree that "on admission to the Union in 1850, title to the land either remained in the United States or passed to California if located in the bed of the Colorado River." See page 5 of Appendix hereto. It is absolutely essential to determine whether subject land was in the bed of the river in 1850. If the movements of the river have resulted in the land now being out of the bed of the river, then it is essential to determine the factual issues concerning movement of the river.

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[3] §315. *Actions by people*

WHEN THE PEOPLE WILL NOT SUE. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. (Enacted 1872.)

Therefore, summary judgment should not have been granted because there existed genuine issues of material facts.

V.

The Decision Below Is of Critical Importance to the Lives of Residents of the Colorado River Valley From Hoover Dam to the Mexican Border.

Between 200,000 and 300,000 acres of land lie in the area that was the bed of the Colorado River prior to the establishment of man made controls. Ownership to this whole area is put in jeopardy by the Circuit Court's decision. The United States has filed ejectment actions in the District Court against more than fifty (50) settlers known to petitioners and has threatened suit against literally hundreds more. Several thousand persons face loss of homes, farm lands, businesses and complete disruption of their lives if the decision is not revised.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

December 9, 1969.

Respectfully submitted,

ZETTERBERG & GEORGE,
ROBERT A. STAFFORD,
Counsel for Petitioners.

APPENDIX.

Opinion of the United States Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Claude S. Gossett, et ux, Defendants-Appellants. No. 23,162.

United States of America, Plaintiff-Appellee, vs. Charles D. Williams, et al., Defendants-Appellants. No. 23,163.

[September 11, 1969]

Appeal from the United States District Court
Central District of California

Before: MERRILL and ELY, Circuit Judges, and KILKENNY, District Judge*

KILKENNY, District Judge:

Before us for review is the action of the District Court in granting summary judgments to plaintiff. Discovery procedures, including affidavits and interrogatories, were extensively employed. We affirm.

Involved is the title and right to possession of lands located in California, west of the present flow of the Colorado River. The runaway waters of this once unpredictable and highly destructive river have left in their wake a substantial body of law. For example, *Arizona v. California,* 373 U.S. 546 (1963); *United States v. Arizona,* 295 U.S. 174 (1935); *Arizona v.*

*The Honorable John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

California, 298 U.S. 558 (1936). The river's catastrophic force was harnessed and its channel stabilized in 1935 by the completion of giant Hoover Dam.

The lands here under scrutiny were ceded to the United States by Mexico in 1848 by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. The river in the area with which we are concerned is navigable, but non-tidal. California was admitted to the Union in 1850 and thereby acquired ownership of the bed of the river, west of the middle of the channel.[1] The land claimed by the Gossetts is located immediately south of the city of Blythe. The Williams land is located approximately 20 miles north of that city. The Williams land, except for a slough, is not within the present flow channel of the river, while the easterly edge of the Gossett land is approximately 3500 feet west of the present channel. Williams has been in possession since 1957, Gossett since 1952. Each claims under a quit-claim deed, from a stranger to the title.

The Boulder Canyon Project[2] was authorized by the Act of Congress dated December 21, 1928, 45 Stat. 1057. By Executive Orders dated February 19, 1929, and October 16, 1931, each issued pursuant to the Act of June 17, 1902, 32 Stat. 388, the lands here in dispute were withrdawn from public entry. Without question, these Orders were issued in implementation of the exigencies created by the Boulder Canyon Project. The United States, by an undisputed affidavit, shows that it has never disposed of the property in question. Neither appellant attempted to trace title to the United States.

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[1]Stat. 452. *United States v. California,* 332 U.S. 19, 41-42 (1947).

[2]43 U.S.C. §§ 617, *et seq.*

Early in the proceedings, the appellants claimed title through the state of California. Thereupon, the Court entered an order joining that state as a party defendant. The state disclaimed all title in, or right to possession of, the property. Subsequently, the United States moved for judgment on the pleadings or, in the alternative, a summary judgment.[3] The Court treated the motion as one for a summary judgment, as evidenced by its consideration of all of the records and files. The motion was allowed and the judgment is the subject of this appeal.

Appellants' main contention seems to be that title was once lodged in the State of California. They argue that the land was below the high water mark of the river at the time California entered the Union and remained part of the bed and below the high water mark until 1935 when Hoover Dam was completed. In some mysterious manner, not disclosed by the record, they claim title from California. In the final analysis, our decision must rest on whether the record discloses a genuine issue of material fact.

To properly approach this problem, we must apply and give full effect to the 1963 Amendment to Rule 56(e).[4] The Advisory Committee notes show that the

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[3]FRCivP 12 (c). ". . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[4]FRCivP 56 (e). ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

amendment was added to overcome a line of Third Circuit cases which severely crippled the effective use of the summary judgment device. These cases consistently held that summary judgment could not be granted if an issue of fact was raised by the pleadings. *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 (3rd Cir. 1948); *United States for Use of Kolton v. Halpern*, 260 F.2d 590 (3rd Cir. 1958); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D. Pa. 1958). The Delaware District Court joined the parade in 1961. *United States v. Ivey Bros. Constr. Co.*, 191 F. Supp. 383 (D. Del. 1961).

The obvious purpose of the amendment was to require a party opposing a summary judgment to set forth specific facts showing a genuine issue for trial, thus strengthening this procedural tool as a means to eliminate sham issues of fact and, in this manner, avoid otherwise lengthy trials. *United States v. Prince*, 348 F.2d 746 (2d Cir. 1965); *Neff v. World Publishing Co.*, 349 F.2d 235 (8th Cir. 1965); *Jacobson v. Maryland Casualty Co.*, 336 F.2d (8th Cir. 1964), *cert. denied* 379 U.S. 964 (1965). Our own analysis of the '63 amendment was recently outlined in *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 903-905 (9th Cir. 1968), thusly: ". . . the showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law. The question to be resolved is whether there is 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' different

versions of the truth at trial.'" Of similar import is *First Nat'l Bank v. Cities Service,* 391 U.S. 253, 288-289 (1968).

All parties agree that on admission of California to the Union, the title to the land either remained in the United States or passed to California if located in the bed of the Colorado. From time to time thereafter, the boundary between the land owned by the United States and land owned by the state of California moved east and west as the bed of the river wandered back and forth. *Beaver v. United States,* 350 F.2d 4 (9th Cir. 1965).

There is no contention that appellants' claims fall within the purview of the Color of Title Act, 43 U.S.C. §§ 1068, et seq. For that matter, on the record before us, such a claim could not be asserted. *Beaver v. United States, supra,* p. 10.

Appellants argue that at least a substantial portion of the property was the bed of the Colorado River when California was admitted and remained so until the completion of the Dam. Then they assert that a plaintiff in ejectment actions, such as these, must stand on the strength of his own title, rather than on the weakness or want of title in the defendants. Citing *McGuire v. Blount,* 199 U.S. 142 (1905); *City & County of San Francisco v. Brown,* 153 Cal. 644, 96 Pac. 281 (1908), among others, appellants urge that their titles might be traced to the state of California and that they were entitled to jury trials on the alleged issues.

The rule employed by appellants is not of universal application. An exception to the rule, on a record such as we have before us, is well stated by the United

States Supreme Court in *Greenleaf v. Birth,* 6 Pet. 302, 312 (1832). There, the Supreme Court held that it was not incumbent on a plaintiff who had *prima facie* good title to establish the non-existence of an outstanding title, but it was the duty of the defendant to make known the source of his title. In the absence of proof to the contrary, the legal presumption is that the title remains in the United States. *Patterson v. Tatum,* 18 F. Cas. 1331 (C.C. Cal. 1874). The fact that the Executive Orders, withdrawing this land from public entry, were issued in 1929 and 1931 is convincing evidence that the Government was claiming ownership and exercising dominion over the property in those years. Here, the Government had *prima facie* title.

Be that as it may, the procedural rule on which appellants rely is now confronted with the positive directives of the 1963 Amendment to Rule 56(e). No longer may a defendant, under Federal practice, play a game of hide and seek, refuse to show his hand, and thus place on the trial court and the opposing party, the unnecessary burden of facing a long, arduous and expensive trial. The onus is now placed on a defendant, under circumstances such as these, to come forward with evidence showing the existence of a genuine issue of material fact.

Assuming, *arguendo,* that title once rested in the state of California, still no attempt is made to show how appellants obtained title from that state. The title could only be obtained by one of two means: (1) by grant from the state, or (2) possibly by adverse possession. The record before us is completely devoid of evidence even remotely pointing to a grant from the state of California. The fact that California disclaims

all ownership to the property is of great significance. We may assume that official duty has been regularly performed and that The Attorney General of the state, who is charged with the duty of defending the state's title to land,[5] would not violate his duty and file an answer disclaiming all title in, or ownership of, the property. Even if California had not been joined as a party and had not filed a disclaimer, appellants would still be confronted with the requirements of the 1963 Amendment. If there exists a patent, or other evidence of a grant from California, the appellants, under the requirements of the '63 Amendment, had the burden of coming forward with such proof. This they have failed to do.

Appellants vaguely suggest that title might have been acquired by adverse possession. Again, compliance with the '63 Amendment is not established by suggestion or creation of suspicion. An issue of material fact must be created. They do not rely on this theory in their briefs, but are content to rest on the common law doctrine that the plaintiff in ejectment must rely on the strength of his own title, rather than on the lack of title in defendants. Under California law, a claimant has a heavy burden in establishing title by adverse possession. *Dimmick v. Dimmick,* 24 Cal. Rptr. 856, 374 P.2d 824 (1962).

Aside from the above, the California courts have uniformly held that land owned by the state, or its subdivisions, which is dedicated or held for public use is not subject to loss by adverse possession. *City of San Diego v. Cuyamaca Water Co.,* 209 Cal. 105, 287

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[5]California Gov. Code, § 12512; *In re Quinn's Estate,* 156 Cal.App.2d 684, 320 P.2d 219 (1958).

P. 475 (1930); *City of Oakland v. Burns,* 46 Cal.2d 401, 296 P.2d 333 (1956); *Sixth Dist. Agr. Assn. v. Wright,* 154 Cal. 119, 97 Pac. 144, 149 (1908) (Tidelands); *City of Los Angeles v. Anderson,* 206 Cal. 662, 275 Pac. 789 (1929) (Tidelands). Of course, adverse possession does not run against the United States. *United States v. California,* 332 U.S. 19, 39-40 (1947); *Utah Power & Light Co. v. United States,* 243 U.S. 389, 408-409 (1917). In the record before us there is not a scintilla of proof that the property was used in a manner which would permit the acquisition of title by adverse possession.

Many other issues of fact are argued by appellants. These we brand as non-genuine and immaterial. The same may be said of most of the alleged issues of law; for example, the issue of whether California owns, or owned, to the high or the low water mark on navigable streams. California had a choice and adopted the low water mark. *Craig v. White,* 187 Cal. 489, 202 P. 648 (1921); *Anderson v. Trotter,* 213 Cal. 414, 2 P.2d 373 (1931); *City of Los Angeles v. Aitkin,* 10 Cal.App.2d 460, 52 P.2d 585 (1935); *Crews v. Johnson,* 202 Cal. App.2d 256, 258, 21 Cal.Rptr.2d 37 (1962). Cases such as *Churchill Co. v. Kingsbury,* 178 Cal. 554, 174 Pac. 329 (1918); *Yolo Water & Power Co. v. Edmands,* 50 Cal. App. 444, 195 P.2d 463 (1920) and *Perry v. State,* 139 Cal.App.2d 379, 293 P.2d 480 (1956) either involve gratuitous statements (*Churchill*), elimination of the issue (*Yolo Water*), or tidal waters. California owns to the low water mark.

If, in fact, appellants were invited by an agency of the Government to make improvements and expend money in improvements on the property, the remedy lies with the Congress, rather than the Courts.

We conclue that appellants have presented no genuine issue of material fact and that the judgment of the lower court must be affirmed.

United States District Court, Central District of California.

Filed, Jun. 6, 1968.

United States of America, Plaintiff, vs. Claude S. Gossett and Katherine May Gossett, Defendants, No. 64-1758-HW.

United States of America, Plaintiff, vs. Charles D. Williams, et al., Defendants. No. 65-812-HW.

AMENDED MEMORANDUM AND OPINION.

On December 4, 1967 the Court made an Order, pursuant to pretrial, in the above-entitled matter which in part provided that the State of California be made a party of these proceedings.

As set forth in the Court's Order the defendants are

> "* * * trespassers—either upon land owned by the United States of America or upon land belonging to the State of California."

Defendants herein assert no title to the land in question. Their only defense is that the United States cannot maintain the present action because the land in question belongs to the State of California.

At the conclusion of the war between Mexico and the United States the treaty of Guadalupe Hidalgo was signed, by which Mexico ceded to the United States all of its territory north of the Rio Grande and Gila

Rivers and all of Alta, California. By the treaty, the United States became owner of the lands in question.

However, upon admission to the Union of the State of California there was transferred to the State, according to custom, the lands beneath the navigable rivers in California. As the Colorado River was a navigable river, the State of California thus became the owner of the land beneath the Colorado River as it then flowed on the California side.

No attempt was made to designate the lands in question by meets and bounds or otherwise although it was recognized that the Colorado River was a meandering river flowing at various places between the mesa or bluffs of Arizona and California.

Subsequent to service herein the State of California filed its Answer and alleges that as between the United States and the State of California, the United States is the owner of and entitled to the exclusive possession of the land in question. California also alleges that it

> "does not own said Section 35, nor any part thereof, nor any accretion thereto, in its sovereign capacity as the owner of the beds of navigable bodies of water within said State."

The sole defense that the defendants have advanced is that California is the owner of the premises in question; therefore, as California denies ownership and right of possession, the defendants' defense must fail.

This problem was presented to the Supreme Court of the United States in 1832 in the case of James Greenfield's Lessee vs. James Birth, 31 U.S. 302 (6 Peters, 302). That also was an ejectment case and the defend-

ant in that case defended upon the ground that the property in question was owned by a third party. The plaintiff contended,

> "* * * that a defendant in the ejectment cannot protect himself under an outstanding title, with which he is in no manner connected." (page 306)

The Supreme Court said:

> "The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such an outstanding title, beyond controversy. It is not sufficient for him to show, that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff; he has a right to stand upon his prima facie good title, and he is not bound to furnish any evidence to assist the defence. It is not incumbent on him, negatively, to establish the non-existence of such an outstanding title; it is the duty of the defendant, to make its existence certain." (page 312)

Plaintiff herein has made a Motion for Judgment on the Pleadings. Inasmuch as the State of California has denied ownership to the lands in question, defendants cannot maintain this action upon the supposition that defendants *may* own the property notwithstanding their denial.

The plaintiff's motion for judgment on the pleadings is granted. Counsel for the plaintiff is directed to prepare Findings in accordance herewith.

DATED this 6th day of June, 1968.

Rule 56(e) of Federal Rules of Civil Procedure.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 991

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

EDWARD M. CLARIDGE and KAY T. CLARIDGE, his wife, *et al.*, and STATE OF ARIZONA, *ex rel.*, OBED M. LASSEN,
Defendants and Appellants.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Defendants and Appellants.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Edward M. Claridge and Kay T. Claridge respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 19, 1969.

Opinions Reported.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the District of Arizona, reported in 279 F. Supp. at 91, also appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 19, 1969. No pe-

tition for rehearing was filed and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Does the bed of a navigable stream include the area over which the waters of the river flow during the normal annual high flow period of the river, although that high flow lasts only six (6) to ten (10) weeks each year?

2. Was the change in the flow pattern of the Colorado River sufficiently within the specific purposes of the Boulder Canyon Project Act so as to prevent the United States from claiming subject lands from Arizona under the doctrine of accretion?

3. Did the construction of Hoover Dam result in avulsive changes on the Colorado River below the dam?

Statement of the Case.

This is an action instituted by the United States for restraining orders, to quiet title, for ejectment from the subject lands and for damages for past use and occupancy of subject lands by petitioners. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1345.

The lands involved are located two miles south of Ehrenberg, Arizona, on the Arizona side of the Colorado River. Petitioners have occupied their land for many years prior to the filing of this action and have improved the land by clearing and leveling it, establishing an irrigation system and building fences and other improvements. They paid for the land and re-

ceived a quitclaim deed from the prior occupier whose title traces through prior occupiers, but not to an original grant from the State of Arizona or the United States.

After the commencement of the action, the State of Arizona signed a lease with petitioners covering subject lands and, upon proper application, was permitted to intervene in the action.

The case was tried before the District Court which entered its Findings of Fact, Conclusions of Law and Judgment holding that title to the subject lands is in the United States, free and clear of any right, title, interest, claim or demand of the defendants or intervenors. This judgment was affirmed by the Circuit Court.

All of the parties agree that Arizona took the eastern half of the bed of the Colorado River in this reach, from the thread to the eastern ordinary high water mark, when it entered the Union in 1912.

The subject lands lie entirely within the area covered by the usual annual high flow of the Colorado River, a nontidal, navigable stream as it flowed prior to the closing of the flood gates of Hoover Dam in 1933. Since the closing of Hoover Dam, the United States admits that the Colorado River has been little more than a canal, controlled by the United States and moved by the United States as it chooses. Subject land borders the present flow channel of the Colorado River in part and in part, it lies several hundred yards to the east of the present channel.

The subject land now lies outside the flow channel of the Colorado River as a result of the regulation of the River by Hoover Dam and other river control activities of the United States.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With Decisions of the Supreme Court of the United States Defining the Bed of a Navigable River as That Definition Applies to the Colorado River in This Case.

Oklahoma v. Texas, 260 U.S. 606, 635 (1923); *Alabama v. Georgia,* 64 U.S. (23 How.) 505, 515 (1859); *Howard v. Ingersoll,* 54 U.S. (13 How.) 380, 415 (1851).

The Circuit Court (page 2 of the Appendix hereto) summarily characterized petitioners' definition of ordinary high water mark as based on the theory that the annual spring floods of the river covered the valley from bluff to bluff and therefore, that the valley, from bluff to bluff, was the river bed. In fact, such bluff to bluff floods occurred but rarely, and the Circuit Court properly rejected any such definition. But the Court did not go on to apply the rule of the cited cases to the fact situation in this case.

Petitioners contend that the bed of the Colorado River between ordinary high water on each bank was the area which supported the normal annual high flow of the river for a period lasting from six (6) to ten (10) weeks every year. It did not spread out over the whole valley but, in the area of subject lands, was a clearly definable area about a mile wide each year. The cases cited by the Circuit Court, while they rightly reject the bluff to bluff flood concept, do support petitioners' position that the bed of the river includes the usual annual high flow of the river.

In *Howard v. Ingersoll, supra,* the Supreme Court said:

> "When banks or rivers were spoken of those boundaries were meant to contain their waters at the highest flow, and in that condition they make what is called the bed of the river. (Emphasis added.)
>
> The call is for the bank, the fast land which confines the water of the river in its channel of bed in its whole width . . . the bank or slope from the bluff or perpendicular of the bank may not be reached by the water for two-thirds of the year, still the water line impressed on the slope is the line required by the commissioner; and the shore of the river, though left dry for any time and but occasionally covered by water in any stage of it to the bank was retained by Georgia as the river up to that line."

A few years later, the Supreme Court in *Alabama v. Georgia,* 64 U.S. (23 How.) 505 at 515, 16 L. Ed. 556, stated,

> "The bed of the river is that portion of soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring or the extreme drought of the summer or autumn."

The Court also said,

> "Banks of a river contain the river in its natural channel where there is the greatest flow of water."

Uncontested evidence at the trial showed that the annual high flow period of the Colorado was a regular, normal part of the flow pattern of the river and was not a freshet or spring flood.

In *Oklahoma v. Texas, supra,* the Court specifically declares that, ". . . the banks of a river are neither the hargis or bluffs which mark the extreme limits of the valley nor the low shifting elevators within the sand bed . . ." and then quotes and follows *Howard v. Ingersoll, supra.*

Subject land was within the area which regularly supported the flow of the Colorado River each year prior to Hoover Dam and was a part of the river bed under the rule of *Howard v. Ingersoll.*

2. The Circuit Court Ignored the Stated Purposes for Construction of Hoover Dam in Ruling That It Is of No Significance Whether Hoover Dam Affected the Course of the River.

The Boulder Canyon Project Act, 67 U.S. Stat. 29, 43 U.S.C. § 617,[1] was enacted by Congress in part for

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[1]SUBCHAPTER I.—BOULDER CANYON PROJECT ACT.

§617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain.

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned in this chapter, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not

the purpose of "controlling floods, improving navigation and regulating the flow of the Colorado River . . ." Pursuant to this Act, Hoover Dam was constructed for the purpose of retaining waters of the river and releasing them in a controlled manner so as to prevent the annual high waters from flowing over the lands at the edges of the bed of the Colorado River, including subject lands. To deny this as a primary purpose of the Act is to deny the meaning of the very words of the Act. If legal consequences in terms of changing title to land follow a change in the ordinary high water mark which defines ownership of the land, then it is sheer folly to say that he who intends to change the water line does not intend to change the ownership.

Yet, the Circuit Court arrives at precisely this conclusion. The decision below cites *Beaver v. United States,* 350 F. 2d 4, 11 (Ninth Cir. 1965) cert. denied 383 U.S. 937 (1966) for the proposition that:

> "The erecting of artificial structures does not alter the application of the accretion doctrine . . . unless, perhaps, structures are erected for the specific purpose of causing the accretion,"

and then states (page 3 of the Appendix hereto):

> "Whether Hoover Dam affected the course of the river is of no significance, for it . . . was not constructed for the purpose of reducing river bed holdings."

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less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, * * * etc. Dec. 21, 1928, c. 42, §1, 45 Stat. 1057.

The result of allowing the decision of the Circuit Court to stand would be to endorse the rule that wherever the United States owns land riparian to a navigable stream, it may go upstream, build a flood control project, and acquire title to the downstream land it dries up.

3. The Circuit Court Ignored the Facts Presented in the Record When It Held That Changes in the River Resulting From Hoover Dam Were Not Avulsive.

The Circuit Court held that "whether Hoover Dam affected the course of the river is of no significance, for it did not result in avulsive changes." (See page 3 of Appendix hereto). Without belaboring the point as to details, the transcript of the trial court proceedings is replete with evidence that the changes in the Colorado River resulting from the closing of Hoover Dam were sudden and dramatic, not gradual and imperceptible. Overnight the river became little more than a conveyance canal compressed into a definite channel of reduced width. These were clearly avulsive, not accretive changes. 65 C.J.S., Navigable Waters, § 81; 56 Am. Jur., Waters, § 476. *Philadelphia Co. v. Stimsen,* 223 U.S. 605 at 624.

4. The Decision Below Is of Critical Importance to the Lives of Residents of the Colorado River Valley From Hoover Dam to the Mexican Border and to the State of Arizona.

Between 200,000 and 300,000 acres of land lie in the area that was within the bed of the Colorado River prior to the establishment of man made controls. Arizona claims that part of the land on the eastern side of

the present flow channel and her stake in this decision is enormous. Thousands of persons face loss of their homes, their farms, their businesses, their very livelihoods, if the United States can go upstream, close off the flow of water in the river, and then, after thirty (30) years come to the settler and the State of Arizona and summarily throw them out.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

December 16, 1969.

Respectfully submitted,

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By STEPHEN I. ZETTERBERG,
Attorneys for Petitioners Edward M. Claridge and Kay T. Claridge.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Edward M. Claridge and Kay T. Claridge, his wife, et al. and State of Arizona, Ex Rel., Obed M. Lassen, Defendants-Appellants. No. 22,312.

Filed, Sept. 19, 1969.

On Appeal from the United States District Court for the District of Arizona.

Before: MERRILL and ELY, Circuit Judges, and KILKENNY, District Judge.*

Per Curiam:

This action was instituted by the United States to quiet title to lands located on the Arizona side of the Colorado River in the Palo Verde Valley. Judgment of the District Court was rendered in favor of the United States. 279 F.Supp. 87 (D.Ariz. 1967). From the judgment the defendants and the State of Arizona, as intervenor, have appealed. They assert that the lands in question are not in the public domain but that title thereto passed to the State of Arizona upon its becoming a state in 1912. They contend that at that time the lands were in the bed of the Colorado River[1] and

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*Honorable John F. Kilkenny, United States District Judge for the District of Oregon, sitting by designation.

[1]Confirming prior case law, the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §1301(a)(1), in effect quitclaims

(This footnote is continued on the next page)

remained there until the construction of Hoover Dam in 1935 reduced the width of the river.

The facts are fully stated in the opinion of the District Court. For the purposes of this appeal it is sufficient to state that appellants' theory is founded on the mistaken assumption that the annual spring floods of the river (suffered prior to the advent of Hoover Dam), which covered the valley from bluff to bluff, constituted its "ordinary high water" and that the valley, from bluff to bluff, thus constituted the bed of the river. By eliminating these floods, appellants contend, the Hoover Dam caused an avulsive change in the flow of the river so that the United States as riparian owner did not take title to the flood plain.

Appellants' definition of "ordinary high water mark" is unsound. The District Court concluded, and we agree:

> "The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow." 279 F.Supp. at 91.

This is in accord with holdings of the Supreme Court. *Oklahoma v. Texas,* 260 U.S. 606, 635 (1923); *Alabama v. Georgia,* 64 U.S. (23 How.) 505, 515 (1859); *Howard v. Ingersoll,* 54 U.S. (13 How.) 380, 415 (1851).

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to the states "* * * all lands * * * covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, * * * up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *."

The District Court was therefore not in error in ruling that a precise location of the high water mark at the time of Arizona's statehood was unnecessary. While the river unquestionably has meandered through the valley since that time, any change in its course has resulted from gradual erosion and not from avulsion, and the resulting accretion passes to the United States as riparian owner. Whether the Hoover Dam affected the course of the river is of no significance, for it did not result in avulsive changes and it was not constructed for the purpose of reducing riverbed holdings. 43 U.S.C. §617. As this court stated in *Beaver v. United States,* 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied,* 383 U.S. 937 (1966):

> "The erecting of artificial structures does not alter the application of the accretion doctrine * * * unless, perhaps, structures are erected for the specific purpose of causing the accretion."

For the reasons set forth in the opinion of the District Court, judgment is affirmed.

Findings of Fact, Conclusions of Law and Judgment.

In the United States District Court, For the District of Arizona.

United States of America, Plaintiff, vs. Edward M. Claridge, et al., Defendants. State of Arizona, ex rel. Obed M. Lassen, Intervenor. No. Civ-5080-Phx.

The within action was instituted by the United States for the purpose of quieting title to certain land hereinafter described, to evict the defendant occupants of the land, and for damages claimed to have resulted from the use and occupancy of the land by the defendant

occupants. The land in controversy is described as follows:

> The South Half of the Southwest Quarter (S½-SW¼) of Section 22; all of Section 27; The South Half of the Southeast Quarter of the Northeast Quarter (S½SE¼NE¼) of Section 28; and that part of Lot Three (3) lying West of the South Half of the Southeast Quarter of the Northeast Quarter (S½SE¼NE¼) of Section 28, Township Three North, Range Twenty-two West, G&SRB&M, Yuma County, Arizona.

The defendant occupants of the land deny the title of the United States and assert title to be in the State of Arizona, and that they, the defendant occupants, are properly in possession by virtue of certain leases executed by the State of Arizona. The defendant occupants also by way of set off and counterclaim assert that they have suffered damages in the loss of a barley crop and the destruction of certain improvements caused by the plaintiff in interferring with their occupancy.

The State of Arizona, intervenor, asserts title to the land upon the theory that the land in question is in fact located between the thread of the Colorado River and the easterly ordinary high water mark of the river, and since the admission to statehood in 1912, the State of Arizona has owned the land in question, and its title thereto has been confirmed by virtue of the Submerged Lands Act, 67 Stat. 29; 43 USC 1301, et seq.

The defendant occupants prior to entering into the leases with the State of Arizona (which leases were executed subsequent to the commencement of this action), asserted their title to possession by virtue of a

quit-claim deed from certain predecessors in interest, for which they had paid a substantial sum, and a land use permit acquired in 1963 from the United States Lower Colorado River Land Use Office, for which they had paid the sum of $2622.00.

The land in question is located in the Palo Verde Valley within the State of Arizona on the easterly side of the present channel of the Colorado River, approximately one and one-half miles south of Ehrenburg, Arizona. A portion of the land in question constituting a "corridor" through Section 28 abuts upon the easterly bank of the present river channel. Except for this area, the westerly border of the land in question is situated approximately one-fourth of a mile east of the present easterly bank of the river channel.

The Palo Verde Valley through which the Colorado River flows is a part of the overall natural basin of the Colorado River. The Valley is approximately fifteen miles in length from North to South, and at the point in question is approximately eight miles in width from East to West. The river flows generally in a northerly to southerly direction. The city of Blythe, California, is located in the Valley to the West of the River and the town of Ehrenburg, Arizona, is located in the Valley to the East of the River. The floor of the Valley is an alluvial plain which has obviously resulted from the deposit of alluvion by the Colorado River as it meandered across the Valley from one side to the other, and from the erosion of the bluff on the California side and the erosion of the bluff on the Arizona side. The westerly limit of the Valley is bounded by the California bluff; the easterly limit is bounded by the Arizona bluff.

The territory of which the land in question is a part was acquired by the United States under the Treaty of Guadalupe Hidalgo. 9 U.S. Stat. 922.[1]

The Colorado River at the point in question is a navigable stream (*Arizona v. Calif.* 283 U.S. 423; *U. S. v. Appalachian Elec. Power Co.* 311 U.S. 377; *Boulder Canyon Project Act,* 67 U.S. Stat. 29), and the State of Arizona holds title to land underlying the River from the thread of the stream to the easterly ordinary high water mark. (43 U.S.C. 1301, et seq., 67 Stat. 29; *Arizona v. Calif.,* 283 U.S. 423).[2]

Historically and prehistorically, the Colorado River has been, at its peak flow, a turbulent and violent river, carrying enormous quantities of water, and with the the ages the deposit of the silt and alluvion by the water, great quantities of silt and alluvion. Over river has resulted in the construction of the alluvial plain which constitutes the floor of the Valley. Since 1874, when attempts to measure the seasonal flow of the river and surveys were undertaken to establish its location, the meanderings of the river have been generally confined to the easterly side of the Valley, along the Arizona side or bluff.

By orders issued January 31, 1903 and February 19, 1929, pursuant to Act of Congress dated June 17, 1902 (32 Stat. 388), all public lands lying within six miles of the Colorado River east of the ordinary high water mark were withdrawn from settlement, entry

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[1]Concluded February 2, 1848; Ratification exchanged at Queretaro, Mexico, May 30, 1848; Proclaimed July 4, 1848.

[2]See also the "Equal Footing Doctrine", *Pollard's Lessee v. Hogan,* 3 How. 212; *Shively v. Bowlby,* 152 U.S. 1; *Kansas v. Colorado,* 206 U.S. 46; and 37 U.S. Stat. 39; 37 U.S Stat. 1738.

or other disposition. Included in the withdrawal orders was that portion of the South Half (S½) of Township Three (3) North, Range Twenty-two (22) West, G.&S. R.B.&M., Yuma County, Arizona, lying east of the ordinary high water mark of the River. The land in question is included in the latter description, unless it lies within the bed of the river between the easterly ordinary high water mark and the thread of the river to the west. The easterly border of the land in question is adjacent to federally owned land to the east.

A great amount of evidence was introduced for the purpose of showing the movements of the river from 1874 to 1964.

From 1874 to 1903, the river moved from a location considerably west of the lands in question to a position where it covered the "corridor" of these lands and a portion of the northwest area of the lands.

By 1912, at the time Arizona was admitted to statehood, the river had moved slightly more to the east toward the Arizona bluff.

Between 1911 and 1915, a levee was constructed along the westerly side of the flood plain of the river to protect agricultural land lying to the west of the river. During this period the "Rabb cut-off" was constructed, resulting in a partial avulsive movement of the river, which did not materially affect the lands in question. By 1915, however, the river had continued its easterly movement so that the normal flow of the river ran to the west of, but near the center of, the lands in question.

By 1922, a loop which had been forming to the north and west of the land in question had moved

south and the river began to move westerly again, so that it covered the "corridor" and the southwest corner area of the land in question. By 1924, the loop had moved further south and the southeasterly extremity of the loop had moved easterly over the central portion of the lands, and the river continued to cover the "corridor"; it then flowed directly south through the center of the lands. As a result of the summer floods of 1924, the river had cut through the loop and the channel returned to approximately the same position it held in 1915. By 1930, the loop had reformed to the west and the river again cut back easterly into the lands in question so that it almost covered the southwest quadrant of the land.

The Boulder Canyon Project Act was passed by Congress in 1928, and among other things authorized the construction of a dam upstream from the land in question at Black Canyon or Boulder Canyon. There were several reasons for the construction of the dam, none of which was for the purpose of establishing the lands in question by avulsion. 43 USC 617.[3] As

[3]SUBCHAPTER I.—BOULDER CANYON PROJECT ACT.

§617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain.

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned in this chapter, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder

a result of the Boulder Canyon Project Act, Hoover Dam was constructed. Its gates were closed and the dam became operative in 1935. Since that time until the present, the river channel has become relatively stabilized so that it flows adjacent to the westerly limits of the "corridor" of the lands in question and from one-half to one-quarter of a mile west of the lands other than the "corridor".

While it is possible to view the area in question and to generally determine the historical movements of the river there are little, if any, physical characteristics from which one might determine the classical "ordinary high water mark" of the river as it existed prior to 1935, nor is it in the opinion of the Court necessary to make such a determination to resolve the issues of this case.

The Court has considered the evidence in this case, the memoranda of the respective parties, and the arguments in support thereof. Being fully advised in the premises, the Court finds as follows:

FINDINGS OF FACT

1. It is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which defendants claim title or right to possession.

Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, * * * etc. Dec. 21, 1928, c. 42, §1, 45 Stat. 1057.

2. The present ordinary high water mark of the river exists by virtue of the controlled flow of the river through Hoover Dam and other dams upstream from the lands in question.

3. The lands in question are located to the east of the present ordinary high water mark of the Colorado River.

4. The lands in question were withdrawn from entry by the withdrawal orders of January 13, 1903 and February 19, 1929, issued pursuant to Act of Congress dated 17 June 1902, 32 Stat. 388.

5. The present ordinary high water mark of the Colorado River so far as it relates to the lands in question is within the existing banks of the river, the easterly such bank lying to the west of the most westerly limits of the land in question.

6. No part of the lands in question lie within the bed of the Colorado River from the thread of the river to its easterly bank, or otherwise.

CONCLUSIONS OF LAW

1. The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow.[4]

2. The ordinary high water mark of the Colorado River at the location in question is within the existing

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[4] *U.S. v. Chicago, B. & Q.R. Co.*, 90 F.2d 161; *Ohle v. Texas*, 260 U.S. 606, 43 S.Ct. 221; See also *Beaver v. U.S.*, 350 F.2d 4.

banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river to confine and improve the channel, which work has been undertaken within the purview of the Boulder Canyon Project Act. 43 USC §617, et seq.

3. The lands in question were established by accretion or reliction from the action of the Colorado River, or by both, and were accreted to or relicted to lands owned of the United States, withdrawn from entry by lawful action of the United States in 1903 and 1929; the title thereto is presently in the United States.[5]

4. The United States could not lose title to the lands in question by estoppel, mistake, laches, adverse possession or acquiescense.[6]

5. The defendants and intervenor have no right, title, interest, claim or demand to the lands in question.

6. If any finding of fact herein involves matters of both fact and law, to the extent that any such finding of fact may be construed more properly as a conclusion of law, the same is hereby adopted and incorporated herein as a conclusion of law.

This Court having decided the case upon the merits, plaintiff's motion for partial summary judgment heretofore taken under advisement is denied.

The Court will retain jurisdiction in the matter for the purpose of determining damages due plaintiff, if

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[5]*U.S. v. Oregon*, 295 U.S. 1; *U.S. v. Washington*, 294 F.2d 830, cert. den. 369 U.S. 817; *Beaver v. U.S.*, 350 F.2d 4.

[6]Art. IV, Section 3, Constitution; *U.S. v. California*, 332 U.S. 19; *Beaver v. U.S.*, 350 F.2d 4; See *Wilson & Co. v. U.S.*, 245 U.S. 24; *Utah Power & Light Co. v. U.S.*, 243 U.S. 389; *U. S. v. Langendorf*, 322 F.2d 25.

any, upon appropriate presentation of evidence on that subject.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that title to the lands in question and described as:

> The South Half of the Southwest Quarter (S½SW¼) of Section 22; all of Section 27; the South Half of the Southeast Quarter of the Northeast Quarter (S½SE¼NE¼) of Section 28; and that part of Lot Three (3) lying West of the South Half of the Southeast Quarter of the Northeast Quarter (S½SE¼NE¼) of Section 28, Township Three North, Range Twenty-two West, G&SRB&M, Yuma County, Arizona,

is in the United States of America, free and clear of any right, title, interest, claim or demand of defendants or intervenor.

Dated at Phoenix, Arizona, this 4th day of November, 1966.

/s/ Walter E. Craig
Walter E. Craig
United States District Judge

I, WM. H. LOVELESS, Clerk of the United States District Court in and for the District of Arizona, do hereby certify that the annexed and foregoing is a true and full copy of the original thereof now remaining in my custody among the records of the said court.

Attest Oct. 3, 1967, Wm. H. Loveless, Clerk, United States District Court for the District of Arizona. By Winona Andre, Deputy Clerk.

LIBRARY
SUPREME COURT

Supreme Court

October Term, 1960
No. 1045

CLAUDE S. GOSNELL, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1969
No. 945

CLAUDE S. GOSSETT, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

Opinions Below

The opinion of the District Court, from the judgment following which an interlocutory appeal was taken to the Court of Appeals, is not reported, but is set forth on page 9 of the Petition. An earlier opinion and order of the District Court for the Central District of California joining the State of California as a party is reported in 277 F. Supp. 11. The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is set forth in the Appendix to the Petition.

Jurisdiction

Petitioners assert that jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

Questions Presented

As far as the interests of the State of California are concerned, the questions presented are:

1. Whether the State of California owns the bed of non-tidal navigable waters to the low-water or to the high-water mark?

2. Whether lands owned by California in the beds of navigable waters are subject to acquisition by private parties by adverse possession?

Statement of the Case

The United States commenced this action by filing separate Complaints for Ejectment and for damages against the Gossetts and against the Williams and others, alleging that the lands in question were owned by the United States as part of the public domain and were withdrawn from entry. Petitioners asserted that the lands in question lie within the bed of the Colorado River as it existed at the time California entered the Union and remained so until the closing of Hoover Dam. The conclusion drawn by Petitioners from this was that upon admission of California to the Union the land was owned by the State of California and never thereafter owned by the United States. The Petitioners never alleged how, if at all, they acquired title from the State.

A motion for summary judgment by the United States was denied, and pursuant to an order of the District Court (277 F. Supp. 11) the State of California was made a party to the case. The State filed an answer which in substance (1) admitted that the United States owned the described land, (2) alleged that as between the United States and the State of California, the United States was the owner of the land, and (3) alleged that the State was not the owner of the described land in its sovereign capacity as the owner of the beds of navigable bodies of water within the State.

After the filing of the State's answer, the United States moved for Judgment as to Possession Only, or in the alternative Summary Judgment, which motion was granted. A Judgment as to Possession Only was entered in favor of the United States. This was affirmed by the Court of Appeals in an interlocutory appeal.

ARGUMENT

The conflicting claims of this case are a) that of the United States that the lands in question are part of the undisposed public domain and b) that of Petitioners that the lands were or are part of the sovereign lands of the State of California.

The basic question presented on appeal, and thus on certiorari, is whether a genuine issue of fact exists which would preclude the granting of a motion for summary judgment. As an adjunct, and among other issues of law, are two questions involving the interests of the State of California: 1) whether California claims sovereign non-tidal lands to the low or high water mark, and 2) whether private parties can acquire title to such sovereign lands by adverse possession. Both questions involve State law. The latter question was never raised in the District Court. The former question is of practical importance since the Petitioners do not seriously contend, if at all, that the lands in question lie below the low-water mark of the Colorado River. The Court of Appeals held that California claims only to the low-water mark on non-tidal navigable waters, and in any event adverse possession does not run against such sovereign lands under California law. Respondent State of California contends that the Court answered both questions correctly.

I

California's Ownership of the Bed of the Colorado River Extends to the Low-Water Mark

The State of California, in its sovereign capacity, is the owner of all tide lands and beds of navigable waterways within its boundaries. *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229, 11 L. Ed. 565 (1845); *Shively v. Bowlby,* 152 U.S. 1, 43, 14 S. Ct. 548 (1894); *Hardin v. Jordan,* 140 U.S. 371, 383, 11 S. Ct. 808 (1891).

The Colorado River, below Black Canyon, is a navigable river (*Arizona v. California,* 283 U.S. 423, 453, 51 S. Ct. 522 (1931).) The west half of the river from the thirty-fifth parallel to the boundary of Mexico is within the boundaries of the State of California (Calif. Const. Art. XXI; Act of Admission, 9 Stats. 452), and was thus owned by California upon admission in 1850. This ownership moved as the river moved naturally and gradually, and conversely, if the change in the bed of the river was caused by an avulsion or suddenly, the State's ownership remained in the former bed. *St. Louis v. Rutz,* 138 U.S. 226, 245, 11 S. Ct. 337 (1891); *County of St. Clair v. Lovingston,* 90 U.S. (23 Wall.) 46, 66, 68, 23 L. Ed. 59 (1874).[1]

As the owner of the beds of navigable waterways, each state has the option, as a matter of state law, whether to claim ownership to the high-water mark, the low-water mark, or allow the adjoining property-

[1]Petitioners in their Statement of the Case and Argument state that the lands in question were part of the bed of the Colorado River in 1850. Respondent does not concede this, but contends it is legally immaterial, the true question being the location of the lands in relation to the bed of the river in its last natural position or, if still in a state of nature, its position today.

owner to own to the middle of the streams. *Hardin v. Jordan, supra,* 140 U.S. 371, 382, 11 S. Ct. 808 (1891); *Packer v. Bird,* 137 U.S. 661, 669-70, 11 S. Ct. 210 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337, 24 L. Ed. 224 (1876).

The State of California, pursuant to this option, has clearly declared that as to lands covered by tidewater, the State takes to the high-water mark, and on non-tidal navigable waterways, the State takes to the low-water mark. Calif. Civ. Code §§ 670, 830; Calif. Code Civ. Proc. § 2077 (5). *Craig v. White,* 187 Cal. 489, 491-92; 202 Pac. 648 (1921); *Anderson v. Trotter,* 213 Cal. 414, 421, 2 P. 2d 373 (1931); *Foss v. Johnstone,* 158 Cal. 119, 127; 110 Pac. 294 (1910); *City of Los Angeles v. Aitken,* 10 Cal. App. 2d 460, 52 P. 2d 584 (1935); *Crews v. Johnson,* 202 Cal. App. 2d 256, 258; 21 Cal. Rptr. 2d 37 (1962).

The Court of Appeals correctly ruled as a matter of California law that California claims the bed of the west half of the Colorado River only to the low water mark.

II

Under California Law, Title to Sovereign Lands Cannot Be Acquired by Adverse Possession

As the Court of Appeals aptly stated, "In some mysterious manner, not disclosed by the record, they [petitioners] claim title from California." (App. to Ptn. p. 3.) Assuming, for the sake of argument, that the lands in question were owned by California as sovereign riverbed land, title could only have devolved on petitioners in one of two theoretical ways: a grant or patent from the State, or by adverse possession. No grant or patent has been produced. Similarly, title to sovereign

lands, under California law, may not be acquired by adverse possession.

Lands beneath navigable waters, as well as tide and submerged lands, which are owned by a state, are owned in their sovereign capacity. *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229; 11 L. Ed. 565 (1845). In turn, these lands are held by the State in trust for purposes of commerce, navigation and fisheries. *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387, 452-54 (1892); *Colberg, Inc. v. State of California, ex rel. Dept. Pub. Wks.,* 67 Cal. 2d 408, 416 (1967). As such, they come within the rule of California law that land owned by the State which is dedicated or held for public use is not subject to loss by adverse possession. *People v. Chambers,* 37 Cal. 2d 552, 556-57, 233 P. 2d 557 (1951); *City of Oakland v. Burns,* 46 Cal. 2d 401, 406-07, 296 P. 2d 333 (1958). This rule has been applied numerous times by California courts to sovereign lands. *People v. Kerber,* 152 Cal. 731, 733-34, 93 Pac. 878 (1908); *City of Los Angeles v. Anderson,* 206 Cal. 662, 668, 275 Pac. 789 (1929) (actual and reclaimed tidelands); *Patton v. City of Los Angeles,* 169 Cal. 521, 147 Pac. 141 (1915) (filled tidelands); *People v. Banning Co.,* 167 Cal. 643, 649-50, 140 Pac. 587 (1914) (tidelands as distinguished from swamp and overflowed lands acquired by grant from the United States and held for sale by the State); *Cimpher v. City of Oakland,* 162 Cal. 87, 90, 121 Pac. 374 (1912) (tidelands); *City of Oakland v. Wheeler,* 34 Cal. App. 442, 454, 168 Pac. 23 (1917) (tidelands).

Thus, again, the Court of Appeals correctly ruled that the title to lands in question was not derived from the State of California.

Conclusion

The dispute in this matter is truly whether petitioners own or are entitled to remain on a portion of the Federal public domain. The resolution of the question is of no official concern to the State of California. As to the questions relating to the State's interest, the Court of Appeals correctly decided these, and it is respectfully submitted that the petition for a writ of certiorari should be denied as to those questions.

Respectfully submitted,

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Attorneys for Respondent The State of California.

January 1970

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 945

CLAUDE S. GOSSETT, KATHERINE MAY GOSSETT, CHARLES D. WILLIAMS AND BONNIE WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1969. Mr. Justice Douglas extended the time within which a petition for a writ of certiorari might be filed to December 20, and the petition was filed December 12. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

373-488—70

QUESTION PRESENTED

Whether, considering the respective title claims to land advanced by the United States and petitioners, the district court correctly awarded a judgment of ejectment in favor of the government.

STATEMENT

The United States instituted this action to eject petitioners from lands located on the California side of the Colorado River at a point where that river forms the boundary between California and Arizona. This is of course within the territory acquired from Mexico in 1848 by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. The lands in question have never been patented out by the United States and were withdrawn from public entry in 1929 and 1931. Thus, title presumptively remains in the United States. It may be that the lands inured to California upon its admission to the Union in 1850 as part of the then bed of the navigable Colorado, but the State disclaims any interest and, at all events, title may have reverted to the United States when the lands became exposed in 1935 after the completion of Hoover Dam. On the other hand, petitioners' ownership claims are based upon deeds from a stranger to the title, executed in 1952 and 1957.

Both the district court and the court of appeals concluded that, because original title had been in the United States and the petitioners could claim only

through the United States or California and did neither,[1] the government was entitled to the relief requested. The court of appeals relied particularly on the 1963 amendment to Rule 56(e), F.R.Civ.P., as requiring defendants in this posture to put forward concrete allegations from which a material factual dispute would emerge to avoid summary judgment.

ARGUMENT

The decision of the court of appeals is correct and presents no conflict between circuits or other question warranting review by this Court. It is undisputed that the United States was the original owner of the lands in question and that no patents embracing them have been issued. The only source of a claim would be the State of California if the lands were in the bed of the Colorado River. Yet it is undisputed that the lands are not now part of the bed of the river and have not been since 1935 when the Hoover Dam was completed; moreover, the State of California has maintained throughout that title is in the United States. In the circumstances, the courts below correctly concluded that, under Rule 56(e), F.R.Civ. P., and *Greenleaf's Lessee* v. *Birth,* 6 Pet. 302, 312, the United States was entitled to judgment.

[1] On the appeal, petitioners did argue that they might have acquired title by adverse possession from the State, but the court rejected the argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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S. BILLINGSLEY HILL,
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Attorneys.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 991

EDWARD M. CLARIDGE AND KAY T. CLARIDGE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–3) is reported at 416 F. 2d 933. The opinion of the district court (Pet. App. 3–12) is reported at 279 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1969 (Pet. App. 1). The petition for a writ of certiorari was filed on December 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for purposes of determining ownership of land claimed by the United States, the bed of a navigable stream includes the area inundated by water for short periods of time each year during the time of highest flow of the river.

STATEMENT

The land involved in this quiet title action filed by the United States is in the Arizona portion of the Palo Verde Valley, about one-fourth of a mile east of the present bank of the channel of the Colorado River.

The valley is about fifteen miles from north to south and at the point in question is about eight miles wide. The floor of the valley consists of alluvial soil deposited by the river as it meandered across the valley and eroded from the Arizona bluff on the east and the California bluff on the west. The area was acquired by the United States from Mexico in 1848 under the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Pursuant to the Act of June 17, 1902, 32 Stat. 388, all public lands within six miles east of the ordinary high water mark of the Colorado River were withdrawn by Executive Orders of January 31, 1903, and February 19, 1929, including the instant land insofar as it is east of the ordinary high water mark.

The Colorado River at this point is a navigable stream and the State of Arizona holds title to the land under the river from the thread to the easterly ordinary high water mark. *State of Arizona* v. *State of California,* 283 U.S. 423.

The Colorado River had been, at peak flow, a turbulent river carrying large quantities of water containing much silt and alluvion. Its meanderings had been principally on the Arizona side. In 1935, the gates of the Hoover Dam upstream from this property were closed,[1] and since then the river has been relatively stabilized to flow in its present position.

After a lengthy trial, in which evidence was presented as to the meandering of the river over a 90-year period (1874 to 1964), the trial court determined that the meandering had been gradual and that the land alternatively submerged and exposed had resulted from an accretive process. Accordingly, it concluded that although the present high water mark exists because of the construction of the Hoover and other dams upstream, the lands were established by accretion or reliction from the action of the Colorado River, or by both, and were accreted to or relicted to lands owned by the United States, withdrawn from entry by lawful action of the United States in 1903 and 1929; and finally that the title thereto is presently in the United States (Pet. App. 11). The court of appeals affirmed, stating (Pet. App. 3):

> The District Court was * * * not in error in ruling that a precise location of the high water mark at the time of Arizona's statehood was unnecessary. While the river unquestionably has meandered through the valley since that time, any change in its course has resulted from gradual erosion and not from avulsion,

[1] The Hoover Dam was constructed pursuant to the Boulder Canyon Project Act of 1928, 43 U.S.C. 617.

and the resulting accertion passes to the United States as riparian owner. Whether the Hoover Dam affected the course of the river is of no significance, for it did not result in avulsive changes and it was not constructed for the purpose of reducing riverbed holdings.

ARGUMENT

The decision of the court of appeals is correct and presents no conflict with decisions of other courts of appeals or other question warranting review by this Court. It is undisputed that the United States was the original owner of this area of Arizona and no patents have been issued. Petitioners' claim is that the land in question is within the bed, *i.e.*, the high water mark, of the Colorado River (Pet. 4–6) or that the construction of the Hoover Dam transferred title to them by precluding future meanderings of the river (Pet. 6–9). This claim was properly rejected by the courts below. It is settled law that the term "high water mark" of a navigable river does not include those areas flooded each year by the spring freshets and most assuredly does not include the bluff to bluff theory here espoused by petitioners. *Oklahoma* v. *Texas,* 260 U.S. 606.

It follows that, for purposes of the present litigation, whether the stoppage of this natural accretive process was caused or controlled by the construction and operation of a dam as a part of a federal project for the general public benefit is of no significance. *Beaver* v. *United States,* 350 F. 2d 4 (C.A. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970